

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )

Implementation of Section 309(j)  
of the Communications Act  
Competitive Bidding )

PP Docket No. 93-253

COMMENTS  
AND  
REQUEST FOR IMMEDIATE PROCESSING OF  
CELLULAR UNSERVED AREA SETTLEMENT

Thumb Cellular Limited Partnership (Thumb Cellular), by its attorneys, hereby submits comments concerning the Commission's October 12, 1993 Notice of Proposed Rule Making (NPRM). Thumb Cellular supports the granting of full market settlements in cellular unserved area markets where applications were filed prior to July 26, 1993 and where settlement agreements were filed with the Commission prior to the release of the NPRM. As explained below, such settlements should be granted immediately without regard to the status of the auction rule making proceeding. In support whereof, the following is respectfully submitted:

**Factual Background**

1) Thumb Cellular is the licensee of Cellular Station KNKQ268, MI RSA #10-B. Thumb Cellular obtained the initial construction permit for MI RSA #10-B and Thumb Cellular has been the only system owner.

2) On March 10, 1993 Thumb Cellular filed an unserved area application proposing to serve an adjacent unserved area in the Detroit MSA #5-B market. On or about March 10, 1993 the licensee of the Detroit MSA #5-B (Station KNKA231), Detroit SMSA Limited

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Partnership (DSLPP),<sup>1</sup> also filed an application to serve that unserved area. Under the pertinent application processing rules, these two applications are considered mutually exclusive. The applications were scheduled for lottery in the Commission's July 9, 1993 Lottery Notice.

3) On September 20, 1993 Thumb Cellular and DSLP filed a Joint Request to Cancel Lottery (Joint Request) with the Commission. The Joint Request was based upon a settlement agreement dated as of September 16, 1993.<sup>2</sup> The proposed settlement envisioned a full market settlement in which the lottery would be cancelled, DSLP's application would be granted, and Thumb Cellular's application would be dismissed.<sup>3</sup>

4) Subsequent to the September 20, 1993 settlement filing with the Commission, undersigned counsel spoke with a representative of the Mobile Services Division (MSD) to ascertain the status of settlement processing. The staff member indicated that processing settlements for cellular unserved market areas was being put on hold. Subsequently, the Commission issued the subject NPRM which confirmed that information.

5) Paragraph 160 of the NPRM requests comments relating to whether full market settlements should be allowed "pending the

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<sup>1</sup> Thumb Cellular believes that DSLP has been the owner of the Detroit B block system since it was initially authorized to commence system construction.

<sup>2</sup> Undersigned counsel's files indicates that settlement discussions commenced with an August 3, 1993 letter from Thumb Cellular to DSLP.

<sup>3</sup> The settlement agreement provides that DSLP consents to contour extensions by Thumb Cellular into Detroit MSA #5-B after DSLP's unserved area application is granted.

decision of lottery or auction." Thumb Cellular respectfully submits that granting the full market settlement agreement for the Detroit MSA #5-B cellular unserved area would serve the public interest.

#### **Granting the Settlement Would Further the Public Interest**

6) Various public interest considerations require that the settlement agreement filed by Thumb Cellular and DSLP be processed. First, as noted at paragraph 17 of the NPRM, the amendments to the Communications Act do not require the Commission to conduct an auction for this spectrum because the subject applications were filed before July 26, 1993. Thus, as a matter of law, the Commission may grant the settlement agreement and an auction is not required. Delaying grant of the settlement while irrelevant auction rules are devised would not serve the public interest.

7) Second, the settlement is between two existing cellular carriers each of which is attempting to expand existing cellular coverage, i.e., neither Thumb Cellular's nor DSLP's application is for an initial construction permit or license. Paragraph 22 of the NPRM indicates that Congress did not intend auctions to be held, and that the Commission does not contemplate holding auctions, where competing modification applications are at issue. Consequently, no purpose is served by delaying the processing of the settlement while the auction rules are drafted. Immediate processing of the settlement would serve Congressional intent and the public interest.

8) Third, Congress envisioned that the auction process would speed service to the public. However, in this case, by delaying settlement processing, the auction rule making has unnecessarily

delayed service to the public. Granting the settlement would serve Congress's explicit goal of expediting service to the public.

9) Fourth, as noted above, the parties have executed a settlement agreement in which one of the applicants will dismiss its application upon grant of the other application. Thus, upon grant of the settlement agreement, there would be only one applicant seeking the frequencies and the Commission would not be required to conduct an auction.<sup>4</sup> Again, service to the public would be expedited through the elimination of auction related issues and procedures vis-a-vis the settlement.<sup>5</sup>

10) Fifth, Congressional intent behind the auctions is to let the market determine to which uses spectrum will be placed. Based upon market forces, the parties determined that settlement would best promote the rapid initiation of service to the public. In the instant case, and in accordance with established Commission settlement procedures, market forces have determined how the market will be served and that determination is contained in the settle-

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<sup>4</sup> The Communications Act amendments require auctions only where there are competing applications. Full market settlements eliminate competing applications.

<sup>5</sup> The NPRM seeks comments on how pre-auction collusion among applicants could be minimized. In the instant case, the two application filers reached a mutually acceptable and beneficial full market settlement and filed the required papers with the Commission. The settlement was filed with the Commission on September 20, 1993 and negotiated in advance of that date. The subject NPRM was adopted on September 23, 1993 and the text of the NPRM was not released until October 12, 1993. Because the settlement was reached before the NPRM was adopted and released, Thumb Cellular and DSLP did not "collude" and they did not reach the settlement in contemplation of the NPRM. Moreover, where a full market settlement is reached under the Commission's settlement rules, collusion does not appear to be an issue.

ment agreement. Because market forces have already determined how the spectrum will be utilized, there is no reason to delay processing of the settlement pending implementation of auction rules.

WHEREFORE, in view of the information presented herein, it is respectfully submitted that the Commission should process the settlement agreement filed in the Detroit MSA #5-B unserved cellular radio market notwithstanding the status of the NPRM.

Respectfully submitted,  
THUMB CELLULAR LIMITED  
PARTNERSHIP

  
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